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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 259

GEORGE D. POULOS,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT C. LONDERHOLM,
Attorney General of Kansas,
State House,
Topeka, Kansas,
KEITH SANBORN,
County Attorney,
Court House,
Wichita, Kansas,
Attorneys for Respondent.

A. J. FOCHT,
Deputy County Attorney,
Court House,
Wichita, Kansas,
JAMES Z. HERNANDEZ,
Deputy County Attorney,
Court House,
Wichita, Kansas,
Of Counsel.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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The petitioner seeks a Writ of Certiorari to the Supreme Court of Kansas to review the decisions of that Court affirming his convictions in the District Courts of Sedgwick County, Kansas, in two separate cases.

In the first case petitioner was convicted by a jury of Third Degree Arson and Subornation of Perjury and sentenced to fifteen years on each count. In the second case petitioner was convicted by a jury of Second Degree Burglary and Grand Larceny and sentenced to fifteen years on each count.

OPINIONS BELOW

The opinions of the Supreme Court of the State of Kansas are reported at 196 Kan. 253, 411 P.2d 694 (1966). And 196 Kan. 287, 411 P.2d 689 (1966), respectively. The opinions appear in the record beginning at R. 123 and RR. 119 respectively. The opinions with the exception of the "Syllabus by the Court" appear in the Petition as appendices A and B.

JURISDICTION

The petitioner seeks to have this Court accept jurisdiction under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

1. Should this Court review a judgment by the Kansas Supreme Court when defendant failed to present evidence of pre-trial publicity causing him prejudice?

2. Defendant failed to offer the testimony of Judge Howard C. Kline at the hearing on his Motion for New Trial and did not include the refusal to permit him to testify as an individual on his notice of appeal to the Kansas Supreme Court or in the specification of error. Should this Court review a question not properly presented to the Kansas Supreme Court?

3. When defendant takes the witness stand on his own behalf and as a part of his defense interjects his previous arrests and convictions into the trial as a tactic, can he appeal to this Court for review claiming that the jury was exposed improperly to his past criminal conduct?

STATUTES INVOLVED

62-1319. Same; removal to another district. Whenever it shall appear, in the manner hereinafter provided, that the inhabitants of the entire district are so prejudiced against the defendant that a fair trial cannot be had therein, the cause shall, by order of the court or judge, be removed to another district, in which such prejudice is not alleged to exist. *Kansas Statutes Annotated 62-1319.*

62-1321. Same; contents of petition; affidavits; notice; rebuttal. In the petition for a change of venue the applicant shall set forth the facts upon which the application is made, and the truth of the allegations in the petition shall be made to appear, by affidavits, to the satisfaction of the court. Notice of such application must be given to the county attorney, who may resist such application by counter affidavits. *Kansas Statutes Annotated 62-1321.*

STATEMENT OF FACTS

Petitioner, hereinafter referred to as defendant, was charged with Third Degree Arson and Subornation of Perjury in an Information filed in the Spring of 1964 for an offense committed in the Spring of 1962[1] (RR. 3-5). Defendant was later charged with Second Degree Burglary and Larceny in an Information filed in the Fall of 1964 for an offense committed in the Summer of 1962 (R. 4-5). The Arson-Perjury case was assigned to the Honorable James J. Noone, Judge of Division Five of the District Court (RR. 5). The Burglary-Larceny case was assigned to the

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1. References herein as "R. ____" are to the record in case designated No. 44,253 by the Clerk of the Kansas Supreme Court wherein the defendant was convicted of Second Degree Burglary and Larceny; and as "RR. ____" to the record designated No. 44,147, wherein the defendant was convicted of Third Degree Arson and Subornation of Perjury.

Honorable James V. Riddel, Jr., Judge of Division Four of the District Court (R. 5).

The two cases were handled separately with the exception of the hearing on the Motion for a Change of Venue which was filed in both cases in the Fall of 1964. Defendant in his motion alleged that the inhabitants of Sedgwick County were prejudiced against him and that he "had been given wide publicity through newspapers circulating in said County and through radio and television broadcasts originating in said County in a manner so derogatory to defendant and prejudicial to his interests, that a fair trial by an impartial and unprejudiced jury is not probable or cannot be had in said County." (R. 6) (RR. 5-6). An affidavit of Roger N. Wilson was attached to this motion. The affidavit stated:

"As a result of publicity and rumor, knows the general reputation of George D. Poulos does reflect upon his character in a derogatory manner generally throughout the community" and that "as a result of the reputation of George D. Poulos it is not probable that a jury could be selected in the above-captioned matter or in any other matter, which would not have a member or members who would not be prejudiced and biased against the said George D. Poulos." (R. 117-118) (RR. 116).

The motion was heard by Judges Riddel and Noone sitting en banc. Defendant called as his first witness Mable M. Snodgrass, the official Court Reporter for Judge Howard C. Kline of Division Two of the District Court. This witness identified defendant's Exhibit "A" as being her uncertified, uncorrected office copy of a transcript of a hearing one year earlier before Judge Kline in another case involving the defendant (R. 36) (RR. 31). Defendant's second witness was Dale Dougherty, a newspaper reporter

for the last nine years. At the time of his testimony he was covering the City Hall beat, but for two years prior to that he had covered the Court House news. He had seen stories in the local news media about the defendant. Within the last six months he had discussed the reputation of the defendant; that the character and reputation of the defendant was bad. The witness stated that he was not sure whether he agreed or disagreed with the affidavit filed with defendant's motion and that he was not sure what the result would be in impanelling a jury (R. 36-37) (RR. 31-32).

Dave Wilson who had been a News Director for nine years for a television station and a resident of Sedgwick County was defendant's third witness. He testified that he had known the defendant for twenty years. He had read and heard news reports concerning the defendant but had never heard him discussed. In his opinion it was not probable that a jury could be selected in which there would have a member or members who would not be prejudiced and biased against the defendant. The basis of his opinion was that an adequate opportunity for forming an opinion had been given to the citizens of Sedgwick County due to the fact that modern communications were so great and wide spread. This fact is true in every case, not just in the case of defendant as he had not been treated any differently in the news media than anyone else who had the headlines frequently. His television station had not made or produced any inflammatory utterances or articles about the defendant and had made no effort to treat him any differently than anyone else charged with a crime. His station can be seen in seventy percent of the State of Kansas (R. 37-39) (RR. 32-34).

Judge Howard C. Kline was called as a witness by the defendant for the purpose of placing in evidence his statement at the time of ruling in another case a year earlier, involving the defendant on the same issue before the Court and to ask him if he had heard or read anything since that time that would have changed his opinion. The Court took judicial notice of Judge Kline's ruling in the prior case and excused him from testifying (R. 8-9) (RR. 8-9).

Roger N. Wilson, the person who signed the Affidavit attached to defendant's Motion, was defendant's last witness. He testified that he had been a newscaster for a local radio station for five years and was acquainted with the defendant. On occasion since October 3, 1963, he had made newscasts in regard to the defendant but that he has been treated no differently than any other person about whom he has occasion to report. His opinion as to the general reputation of the defendant is divided. Based on his judgment of the feeling of the community, half of the community feels that the defendant is a man of unsavory reputation. The other half of the community's opinion is that the defendant has a reputation roughly comparable to a Robin Hood and a man who is persecuted. There is an equal possibility, or probability, that the State of Kansas might not receive a fair trial from some jurors because of the defendant's reputation as a man who has on occasion been persecuted as there is that the defendant might not get a fair trial. His opinion was not based on any concrete facts or circumstances, but only his impression of what others have said and he had overheard. He testified that there could possibly be some and possibly a good number of people who might wish to see the defendant in prison whether he was guilty or not, but the witness was not sure that this was the feeling of the entire community or even the majority of them. It is within the realm of proba-

bility that neither the State of Kansas nor the defendant would be granted a fair trial in Sedgwick County (R. 39-41) (RR. 34-36).

Following the introduction of the testimony by Mr. Wilson, counsel for the defendant proffered defendant's Exhibit "A" for the purpose of showing the Court the reasons for the ruling by the Honorable Judge Howard C. Kline. Counsel stated that Judge Kline's ruling in that case was analogous to the situation in the Hendrick case, 155 Kan. 165. Counsel stated that he did not care so much about the testimony of the witnesses he had presented at the hearing, but that he did care that Judge Howard C. Kline's findings of fact and conclusions of law which were not proven in each instance by the evidence of the defendant in the previous hearing should be placed before the Court (R. 41-42) (RR. 36-37).

The State then introduced its evidence which consisted of thirteen Counter Affidavits which were taken by A. J. Focht, a Deputy County Attorney, Sedgwick County, Kansas, who testified that he used primarily a jury list from a jury panel that had finished their service. In addition to that he picked at random other persons to which to submit a sample Counter Affidavit which gave them several choices. In addition to these thirteen Counter Affidavits, one additional Counter Affidavit was submitted which was taken by Martin Updegraff, a Deputy County Attorney (R. 44-46) (RR. 39-41).

Of the fourteen persons who were submitted Counter Affidavits, three people had knowledge of the defendant. In addition six other persons had heard of him. Each of the thirteen persons swore that he had not formed or expressed an opinion about the guilt or innocence of the defendant or the merits of the case which would require evi-

dence to dispel, and further each of them swore that if he were selected to sit as a juror he would limit their consideration and deliberation to the law, the evidence and the common knowledge he shared with all mankind (R. 46-53) (RR. 41-48).

The State then rested and the Judges both ruled that they had not been convinced or shown that there was any basis for a change of venue and that they personally had no apprehension or fear that the defendant would not receive a fair trial or that a jury of fair and impartial jurors could not be selected to try him. The application was overruled and both cases set for trial (R. 46) (RR. 41).

The Arson-Perjury case came on for trial some three weeks later with the defendant represented by the former County Attorney and a former Chief Deputy County Attorney (RR. 12). A jury was selected with no difficulty. No juror was challenged for cause and following the voir dire examination both the State and defendant waived their last three peremptory challenges. At that time the defendant's chief trial counsel states: "If your honor please, I think we have a good jury." (RR. 48).

The State's evidence was then produced which showed that on April 12, 1963, a Lockheed Lodstar Airplane which had been purchased for $13,500.00 and insured for $100,000.00 was parked at the Airport by the pilot for the owner (RR. 78). A large explosion was heard and felt as far as a mile away and the plane immediately caught fire and began to burn (RR. 49-52).

Men from the airport and the fire department arrived and battled the blaze to no avail (RR. 55). The gasoline tanks ruptured and the plane was destroyed by fire (RR. 53). The scene was immediately protected by law enforcement agencies and an investigation commenced (RR.

55). Physical evidence was obtained at the scene consisting mainly of various parts of the airplane found in areas varying up to several hundred yards from the airplane (RR. 51-56). These parts were secured by the Wichita Police Department and subjected to chemical and physical examination by expert witnesses. These witnesses testified that the airplane had been destroyed in a high level dynamite explosion which caused the fire. This was supported by chemical analysis of the residues taken from the destroyed airplane which were compared with controlled experiments performed by the witnesses with dynamite and gasoline (RR. 69-74).

A co-defendant, Rex Conn, was called as a witness who testified that he and two other co-defendants, James Dolan and Eugene McCroskey, were hired by the defendant to destroy the airplane (RR. 64). The witness said that he and the other two co-defendants had obtained a satchel of dynamite from the defendant (RR. 64). They drove to the airport and set the dynamite off under the airplane (RR. 65). The ownership of the automobile by Eugene McCroskey was substantiated by a member of the Intelligence Unit of the Kansas City, Missouri Police Department (RR. 69).

A few days later all the co-defendants (who later pled guilty and are incarcerated) met with the defendant on the Kansas Turnpike where an argument ensued over money (RR. 65). An official of the Kansas Turnpike substantiated the date of the meeting by records showing entrance and exits (RR. 66-67). A reluctant witness, produced under the provisions of the Uniform Production of Witnesses Act, admitted that he had discussed with the defendant the matter of blowing up an airplane but had refused to participate because of fear of getting into

trouble with the Federal Authorities. The witness was told by defendant later that someone else had gotten the money he could have had (RR. 58-64). This witness admitted he was afraid to testify against the defendant. Another witness who had discussed destruction of the airplane with the defendant before it was destroyed testified that he gave a watered-down deposition in a civil case pending in the United States District Court over damage to the airplane. This was done to insure that his business and health would not be endangered (RR. 55-58).

Another witness, Paul Luttrell, admitted giving a false deposition in the same case due to fear for the safety of his children (RR. 67-69). The witness had overheard a conversation in which the defendant told one of the co-defendants that if he needed money why didn't he go out and blow up an airplane. This conversation occurred prior to the destruction of the plane (RR. 67).

The defense to the arson was that the plane was destroyed in a gasoline explosion followed by a fire rather than a dynamite explosion. An architect and an engineer testified as expert witnesses. They were of the opinion that the damage was not consistent with a high level explosion. They had run tests and experiments to substantiate their opinions (RR. 80-82). Neither witness had taken into consideration any chemical analysis in arriving at their opinion nor had they physically inspected the airplane. One of them had examined physically one small piece of aluminum (RR. 80-82).

The President of the Corporation that owned the airplane testified that he had never talked to the defendant and that the assets of the corporation were considerable (RR. 78-79).

In defense of the perjury count the defendant's wife and his friend testified that the two witnesses for the State had said they were lying for the Wichita Police Department (RR. 74-75).

In rebuttal the State produced further chemical tests performed after the trial was started to substantiate that dynamite and not gasoline had caused the explosion (RR. 83).

A witness testified that on the morning following the fire he had seen the President of the Corporation that owned the airplane engaged in conversation with the defendant in a snack bar (RR. 83). The Certified Public Accountant for the Corporation stated the company had suffered large losses in that year (RR. 83).

The jury found the defendant guilty (RR. 16). Defendant filed his Motion for a New Trial which was argued and overruled (RR. 85-94). The next day counsel for defendant was allowed to reopen his argument to allege for the first time that his rights under the Fifth Amendment and Fourteenth Amendment, Section One to the United States Constitution were violated (RR. 94-96).

The defendant was then sentenced as a habitual criminal to fifteen years on each count. He appealed the verdict to the Kansas Supreme Court. No contention was made that there was any public outcry or interest shown in the trial, or that the jurors were excited, upset or prejudiced. The Court did not overrule any motion for a mistrial on the part of anyone. The defendant abandoned his formal ground of jury misconduct at the hearing on the Motion for New Trial (Petition, App. 8).

The Kansas Supreme Court affirmed the judgment of the trial court finding that there was no evidence to substantiate "the defendant's allegation that publicity

through newspapers, radio and television had brought about his prejudice because the publicity was so derogatory to him and prejudicial to his interests that a fair and impartial jury could not be had. Not one single newspaper article was attached to his motion or introduced in evidence, and no other affirmative evidentiary examples of where or to what extent prejudice existed against the defendant were offered." (Petition, App. 7-8).

The Burglary - Larceny case came on for trial on December 14, 1964 (R. 11). The defendant moved to continue the matter to the January term of Court, which was denied, and orally moved for a change of venue, which was denied (R. 11). The jury was selected and the evidence presented (R. 11). The jury deliberated for two days and announced that they were deadlocked and could not agree (R. 12). The Court declared a mistrial for that reason and ordered the defendant to return for trial at a future date (R. 12). The defendant's Motion to continue the matter to the January term of Court was granted over the State's objection (R. 12). The case was set for January 18, 1965, the opening day of the January term (R. 12).

On February 1, 1965, the defendant went to trial in the United States District Court for the District of Kansas on an indictment returned against him August 22, 1963 (R. 114). No Motion for a change of venue, Motion for transfer of division because of prejudice of the inhabitants, or for a counter-designation of trial was filed (R. 121). On February 5, 1965, the defendant was convicted in the United States District Court (R. 117).

Approximately one month later the defendant went to trial on the Burglary-Larceny case (R. 118). No difficulty was had in selecting a jury and the defendant

challenged no juror for cause (R. 53-61). One juror was excused because of personal business reasons over the objection of the defendant (R. 54). Defendant exercised all of his peremptory challenges during the course of which he excused one juror who testified on voir dire examination that he had never heard of the defendant and did not know him (R. 56-57). The defendant also excused another juror who was not even asked whether he had heard of the defendant (R. 60-61).

The State's evidence showed that in July of 1962, the defendant had a conversation with one Rex Conn at the Town House Motor Hotel in Wichita, Kansas, in which the defendant told Conn he would like to have some television sets from the Town House and that he had a master key to open the doors (R. 16); Conn agreed to get the sets and defendant gave him the master key (R. 16); using the key given him by the defendant, Conn entered four hotel rooms, took a television set from each room, placed them in his car and drove east on Kellogg Street (R. 16); the defendant pulled alongside of Conn's car on Kellogg and Conn followed him to a park where the defendant told him to wait (R. 16); the defendant then drove off and returned a few minutes later with a man by the name of Russ Adams (R. 16); Conn and the defendant unloaded three of the stolen television sets from the car and placed them in Adams' car; Adams gave the defendant the money for the three sets and the defendant handed Conn $75.00 as his share (R. 16); Conn and the defendant then loaded the fourth set into the defendant's car and Conn left for home (R. 16).

A bellman at the Allis Hotel in Wichita, Kansas, testified that the defendant had, subsequent to the date of the charged offense, approached him and offered him

money for a pass key to the guest rooms (R. 18). The defense was alibi and persecution. The defendant took the stand and on direct examination by his own attorney went through his complete criminal record for the first time before the jury (R. 21-22). He also told the jury that he had been arrested by the Wichita Police Department some 100 times (R. 21). The jury found the defendant guilty of Second Degree Burglary and Larceny and following a Motion for a New Trial being filed and argued the defendant was sentenced to fifteen years on each count as a habitual criminal (R. 119-121).

The case was then appealed to the Kansas Supreme Court who affirmed the judgment pointing out that no difficulty had been experienced in obtaining a qualified jury (R. 124). The defendant challenged no juror for cause (R. 124). Each member of the jury panel finally selected to hear the cause was thoroughly examined and passed for cause by defense counsel for the defendant. The defendant had expended one of his peremptory challenges against a prospective juror who had never heard of him rather than on one who had (R. 124).

No evidence of any inflammatory press releases during the trial was brought to the attention of any Court (R. 124). Nor was there any claim that public wrath or indignation was rampant (R. 125). The public displayed no interest of any kind in the trial proceedings (R. 125). There was no showing the jury was stampeded into hasty judgment by any show of public outrage (R. 125). The deliberations of the jury constituted part of two days (R. 125).

REASONS CERTIORARI SHOULD BE DENIED

1. Defendant Failed to Present Any Evidence of Publicity Causing Prejudice to Him.

Defendant alleges a "shadow of doubt" hung over any jury selected to try the defendant from Sedgwick County (Pet. p. 9). He relies on *United States* v. *Florio*, 13 F.R.D. 296 (S.D.N.Y. 1952). A review of *Florio* indicates this was a hearing on a motion for a change of venue. The trial court was detailing his reasons for changing venue. The court reviewed the evidence that was presented to him in connection with the motion. In *Florio* the court points out that on the very morning of the selection of a jury to try the defendant, newspaper articles appeared in various newspapers describing the defendant as a "mobster" and leader of a notorious organization known as the "Ed Florio Gang" (p. 296). There were frequent references to defendant's past criminal record and accusations of crimes not connected with the crime he was indicted and to be tried for. The Court stated:

> "This publicity was not of the usual sort which accompanies an important trial of public interest." (p. 298).

How different the *Florio* case from this case! Defendant conceded below that:

> "In seeking a change of venue the burden rests upon him to show to the satisfaction of the District Court that the inhabitants of Sedgwick County were so prejudiced against him a fair and impartial trial could not be had, citing State v. Hooper, 140 Kan. 481, 37 P.2d 52, and further that the District Court must be allowed discretion in such matters, citing State v. Knadler, 40 Kan. 359, 19 Pac. 923." *State* v. *Poulos*, 196 Kan. 253, 257, 411 P.2d 694.

The applicable Kansas Statutes providing for a change of venue in criminal cases are set out in statutes involved. K.S.A. 62-1319 is not unlike Rule 21 of the Rules of Criminal Procedure applicable to the Federal Courts. The law in Kansas on the subject is clear and was stated by the Kansas Supreme Court in *State* v. *Turner*, 193 Kan. 189, 392 P.2d 863.

> " 'It has been a long-standing rule in this state, as stated by Justice Brewer in State v. Furbeck, 29 Kan. 532, that before a court is justified in sustaining an application for a change of venue on account of the prejudice of the inhabitants of the county, it must affirmatively appear from the showing that there is such a feeling and prejudice pervading the community as will be reasonably certain to prevent a fair and impartial trial. In State v. Parmenter, 70 Kan. 513, 79 Pac. 123, this court said it is not enough that prejudice against the defendant exists; but as the statute provides, it must exist to such an extent that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair trial cannot be had therein. In State v. Bassnett, 80 Kan. 392, 102 Pac. 461, it was said that G.S. 1949, 62-1321, requires that where proof is made by affidavits they must be to the satisfaction of the court. It is not enough that the petition state prejudice exists and a fair trial cannot be had; specific facts and circumstances showing prejudice must be stated, and not conclusions (State v. Welch, 121 Kan. 369, 247 Pac. 1053). This subject has been thoroughly treated by this court in the case of In re Hedrick Appeals, 155 Kan. 165, 123 P.2d 806, wherein it was stated:
>
> " 'The facts that the arrest of one charged with crime and the offense of which he is charged have received an extensive amount of publicity in many newspapers, local and metropolitan, which are distributed and read throughout the county or judicial district, and the

matters generally discussed by the inhabitants and opinions freely expressed concerning the same, without more, are insufficient as a matter of law to sustain an order for the change of venue.' (Syl. ¶7). See, also, State v. Vernon King, 190 Kan. 825, 833, 378 P.2d 147.

" 'The well-established rule is that before a change of venue to another county can be granted it must affirmatively appear that such prejudice exists as will be reasonably certain to prevent a fair trial. The ruling of the trial court upon this question will not be disturbed when supported by competent evidence, as it was here. (State v. Miller, 131 Kan. 36, 38, 289 Pac. 483; State v. Hooper, 140 Kan. 481, 495, 37 P.2d 52).' "

The Kansas Statutes providing for an application for a change of venue contemplate that the trial will be on the issues framed by the affidavit filed in accordance with K.S.A. 62-1321. The test to be aplied by the Court is set out in K.S.A. 62-1319. Specific facts and circumstances showing prejudice must be stated in the evidence and the affidavit and not conclusions. *State* v. *Welch*, 121 Kan. 369, 247 Pac. 1053.

Following denial of a change of venue the trial court's decision may be reviewed by the Kansas Supreme Court. An abuse of discretion by the trial court in denying the change of venue must be conclusively established by the record. *State* v. *Waldron*, 118 Kan. 641, 236 Pac. 855.

Factors the court considers in determining whether the trial court abused its discretion in overruling a motion for change of venue are set out in *State* v. *Poulos*, 196 Kan. 253, 41 P.2d 694. They include a study of the testimony of witnesses presented as to any facts or circumstances showing prejudice. Here defendant filed one affidavit. (R. 117). The State countered with fourteen af-

fidavits (R. 46-53). The defendant called the affiant and two other witnesses to testify as to pretrial publicity. The affiant testified he has been a resident of Wichita for five years and was acquainted with the defendant; that he had made newscasts regarding the defendant, but he had been treated no differently than any other person about whom he had occasion to report; that based on the general reputation of the defendant in the community, half of the community felt the defendant was a man of unsavory reputation and the other half was of the opinion the defendant had a reputation roughly comparable to a Robin Hood and a man who was persecuted; that there was equal possibility or probability the State of Kansas and the defendant might not get a fair trial; that his opinion was not based on any current facts or circumstances, but was only his impression of what others had said and he had overheard, and that there could be a good number of people who might wish to see the defendant in prison whether he was guilty or not, but he was not sure this was the feeling of the entire community or even the majority (R. 39-40).

An analysis of the testimony presented by defendant reveals the witnesses testified to no facts or circumstances showing prejudice. The Kansas Supreme Court found:

> "There was no evidence which substantiated the defendant's allegation that publicity through newspapers, radio and television had brought about his prejudice because the publicity was so derogatory to him and prejudicial to his interests that a fair and impartial jury could not be had. Not one single newspaper article was attached to his motion or introduced in evidence, and no other affirmative evidentiary examples of where or to what extent prejudice existed against the defendant were offered." *State* v. *Poulos*, 196 Kan. 253, 258, 411 P.2d 694 (Pet. App. 7-8).

This Court has determined that in general the burden of establishing prejudice on the part of a juror when there is a claim of violation of due process is upon he who claims it. *Irvin* v. *Dowd*, 366 U.S. 717.

Certain well reasoned exceptions to this rule have been laid down. When a State substitutes trial by ordeal through television coverage of the confession of a defendant and it is seen by a substantial number in the community, it will be presumed that prejudice exists. *Rideau* v. *Louisiana*, 373 U.S. 723.

When there is massive pretrial publicity coupled with television of the court proceedings over defendant's objection in such a way as to make a fair solemn judicial determination of defendant's guilt or innocence impossible, it will be presumed that the defendant suffered thereby. *Estes* v. *Texas*, 381 U.S. 532.

A cause celebre with intrusion by the press into the very trial itself coupled with action of state officials in adding to the publicity and failing to take corrective steps to protect the defendant cause a totality of circumstances which warrant the conclusion that the trial was inherently lacking in due process. *Sheppard* v. *Maxwell*, 384 U.S. 333.

The instant case meets and passes with flying colors all tests laid down by this Court. An independent review of the record will reveal that this was no cause celebre as in *Sheppard*. Indeed the court below notes that no contention was made that there was any public outcry or interest in the trial. There was no inflammatory news articles, or any claims of such. There was no disclosure to news media by police or prosecutor of evidence which would be admitted in the trial. No statements were shown to have been given by the police or the prosecution to the news media.

No one attended the motions on the change of venue save those on business with the court and one person who worked in the courthouse. The only newsmen present were those summoned by the defendant (R. 43).

The first trial commenced more than two years after the crime. Following the conviction defendant was tried in the same city in the United States District Court. He failed to move for a transfer of trial under Rule 21 of the Federal Rules of Criminal Procedure, which is strong evidence that he did not believe his own allegation that a fair jury could not be had in Sedgwick County, Kansas (R. 121). No misconduct of police, prosecutor, prosecution or jurors was claimed by anyone.

In the final analysis the most important question is whether the defendant was tried to an impartial jury. In the Arson-Perjury case no juror was challenged for cause. The defendant waived half of his peremptory challenges (RR. 48), stating:

> "If Your Honor please, I think we have a good jury." (RR. 48).

No contention is made that the jurors were excited, upset or prejudiced (Pet. App. 8). The record does not show the court overruled any motion for a mistrial due to prejudicial conduct on the part of anyone. Following a hung jury on the first trial of the Burglary-Larceny case, the jury that convicted the defendant was selected. Only one man was excused by the court for personal reasons. No one was challenged for cause by the defendant. The only person excused had heard of the defendant and yet the defendant objected to his being excused (R. 54). No jurors were excused for cause by either side (R. 124). Defendant even expended one of his peremptory challenges against a person who had never heard of him rather than

against one who had (R. 124). No claim was made that the public wrath or indignation was rampant. The lower court found:

> "Indeed, there is little indication that John Q. Public displayed interest of any kind in the trial proceedings. It can hardly be contended that the jury was stampeded into hasty judgment by any show of public outrage when the deliberations consumed part of two days." (R. 125). *State* v. *Poulos*, 196 Kan. 287, 290, 411 P.2d 689.

Defendant in his petition fails to point out to this Court that he was convicted by two separate juries. He also fails to mention that he was convicted by a jury in the Federal Court of which he made no complaint. Yet this jury sat in the same city and was drawn from the same area that was served by the news media that he complains of. Perhaps recognizing the total lack of evidence which he presented to the trial court in behalf of his Motion for a change of venue, defendant has in his petition cited as authority for his evidence defendant's Exhibit A, which was offered by him but was refused by the trial court for the reason that it was the trial judge's opinion in a previous case decided over a year earlier (R. 108). Defendant failed to present a single newspaper article to the court for consideration and conceded his evidence fell short of that required by the applicable Kansas law (R. 42). Defendant should not now complain of his conviction for as the Kansas Supreme Court found the evidence was ample against him. It was not a prejudiced jury that convicted the defendant, but a good group of citizens doing their sworn duty under the law to "well and truly try the case according to the law and the evidence."

The fact that petitioner did not challenge for cause any of the jurors selected is strong evidence he was convinced the jurors were not biased and had not formed any opin-

ions as to his guilt. *Beck* v. *Washington*, 369 U.S. 541. Defendant has failed completely at any stage of this proceeding to present any evidence which would have allowed a court to properly change venue. It is as this Court stated in *Beck* v. *Washington*, 369 U.S. 541:

> "While this court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'" (p. 558).

2. Defendant Failed to Properly Preserve the Question of Exclusion of Judge Kline's Testimony and This Court Should Refuse to Review the Decision of the Kansas Supreme Court on the Question.

Defendant did not proffer Judge Kline's testimony at the hearing on the Motion for New Trial. He proffered an uncertified, uncorrected shorthand copy of a hearing in front of Judge Kline in October of 1963, a year before the hearing in the instant case (R. 91) (RR. 88).

The record is not clear that defendant did in the Burglary-Larceny case even proffer defendant's Exhibit A (R. 90-93) (Defendant's Exhibit A) (R. 95-111). This is not what the Kansas Law contemplates. It requires that where error is claimed in the exclusion of evidence that evidence must be produced at the hearing on a Motion for New Trial by affidavit, deposition or oral testimony. Kansas Statutes Annotated 60-259; *State* v. *Wellman*, 102 Kan. 503, 170 Pac. 1052. Failure to comply with this requirement precludes review by the Kansas Supreme Court. *State* v. *Trams*, 189 Kan. 393, 369 P.2d 223.

The Kansas Supreme Court pointed out that defendant had failed to comply with this requirement in its opinion. *State* v. *Poulos*, 196 Kan. 253, 411 P.2d 694:

> "At the hearing on the motion for a new trial, the defendant did not offer Judge Kline's testimony as an individual, nor is the refusal to permit him to testify as an individual included in the notice of appeal or in the specification of error." p. 262.

The Kansas Supreme Court however did point out that to allow Judge Kline to testify would have been to compound error. The Court stated:

> ". . . In the first place, as pointed out by the district court, the statute (K.S.A. 62-1321) provides that the truth of the allegations of a petition for change of venue shall be tried by affidavits of the petitioner and counter affidavits of the state. The requirement does not contemplate statements of a judge in deciding a prior and wholly unrelated case to the one then pending before the court. In the second place, with one exception, all of the witnesses who testified before Judge Kline were present and testified in the instant case. Obviously, the fact of calling him could not have been to testify to matters which transpired at the former hearing. The witnesses were present and the opportunity was afforded to ask them any questions they were previously asked. In fact, the record discloses the same general questions were asked and answered. In the third place, and without passing upon the validity of Judge Kline's previous order which is not before us, it would have been impossible for the state to file counter affidavits in opposition to Judge Kline's state of mind, who made his decision based on facts within his own knowledge (State v. Taylor, 137 Kan. 280, 20 P.2d 628). The proof is to be made under the sanctity of an oath, not upon the opinion of unsworn persons who do not disclose the source of facts recited. As previously indicated, Judge Kline's conclusion was not based upon evidence presented before him, but was based upon his own knowledge.

> After the district court denied the proffer, counsel inquired if the court's ruling would be the same if Judge Kline were called as any other citizen to testify without referring to the previous case. The court stated:
>
> 'If there is any reason why this man cannot get a fair trial' in this court that exists today, there is nothing to stop you from putting on evidence as to what they are today, not what they were last October.'
>
> Counsel made no attempt to call Judge Kline as an individual citizen, but rested his case, offering no further testimony. . . ." *State* v. *Poulos*, 196 Kan. 253, 261, 411 P.2d 694 (Pet. App. 11-12).

Counsel for defendant had made quite clear his real purpose in calling Judge Kline to testify. The Kansas Supreme Court ferreted out this purpose by supplying the emphasis to the quotation taken from the record. *State* v. *Poulos*, 196 Kan. 253, 260 (Pet. App. 10-11).

Defendant had conceded that in the previous hearing in front of Judge Kline he had failed as a matter of law to prove the requisite elements for a change of venue and that Judge Kline had nevertheless changed the venue to another district on facts within his own knowledge (RR. 123).

The Kansas Supreme Court correctly held that this was improper and should not have been allowed. The Court further pointed out that defendant failed to preserve this on appeal (RR. 124).

In his petition defendant quotes part of the ruling in the trial court on refusing to allow Judge Kline's testimony (Pet. p. 9). The complete ruling must be viewed in the context of the situation confronting the court (Pet. App. 10-11). The trial court pointed out it was not precluding defendant from calling any witnesses, but was interested

in hearing evidence as to the climate of public opinion at the time of the hearing and not what it was a year earlier when Judge Kline had ruled. *State* v. *Poulos*, 196 Kan. 253, 261, 411 P.2d 694 (Pet. App. 12).

The basis of the rule that excluded testimony must be presented to the trial court at the hearing on the Motion for New Trial is founded in logic. To review the propriety of refusal to allow testimony, it is necessary for the reviewing court to know what that testimony would be. Failure to preserve this record precludes review as the court has nothing before it to review. Here the proffered testimony at best was a transcript of a year old hearing and failed to meet the requisite standards of the Kansas Supreme Court which are grounded in reason and sound policy while granting a fair opportunity to all parties to be heard. The defendant failed to comply with the requirements and should be precluded from having this Court review the matter.

3. Where Defendant Interjects His Past Criminal Activities As a Defensive Tactic Claiming Persecution in a Jury Trial, He Should Not Complain to This Court That the Jury Was Improperly Exposed to His Past Criminal Record.

This Court should recognize that defendant was tried three times. The first case was the Arson-Perjury case. There has never been a claim raised that the jury in that case was subjected to the situation existing in *United States* v. *Marshall*, 360 U.S. 310. In that case during the trial inadmissible evidence as to past criminal conduct of the defendant was printed in the newspaper during the trial. Some of the jurors in a special voir dire examination by the trial court admitted reading the articles. This Court ordered a new trial in its supervisory capacity over the lower Federal Courts.

In the instant case no such claim has heretofore been made. However, defendant states in his petition:

> "Here, as in *Marshall,* adverse publicity resulting in exposing the jury to the normally inadmissible facts relating to the petitioner's other alleged involvements in local crimes and arrests on charges similar to the current one." (Pet. p. 10).

This does not happen to be true and the record in this case shows quite clearly that such a statement had its conception and birth in the mind of the defendant but was stillborn as a fact. It should be noted that defendant did not even include the voir dire examination of any jury in the record prepared for the Kansas Supreme Court. It was necessary for the State to prepare such matter in its counter abstract in the Burglary-Larceny case (R. 53-61).

In the Arson-Perjury case, the Kansas Supreme Court pointed out:

> "The record does not show the court overruled any motion for a mistrial due to prejudicial conduct on the part of anyone. Nor does the defendant claim there was any misconduct on behalf of the jury, although one of the grounds of his motion for a new trial was that a member or members of the jury had been guilty of misconduct. That ground was abandoned by the defendant at the hearing of the motion for a new trial and it is not raised as a specification of error in this appeal." *State* v. *Poulos,* 196 Kan. 253, 258, 259, 411 P.2d 694 (Pet. App. 8).

Following his conviction in that case, defendant was tried to a jury on the Burglary-Larceny case. The jury was unable to agree and a mistrial granted and the case rescheduled for trial (R. 11-12). In the retrial the record shows that defendant took the stand and as part of his tactical defense claimed that he was being persecuted. He detailed for the jury the number of arrests he had had (R.

21). The State was then put in the rather odd position of attempting on cross-examination to show that the defendant was testifying that he was a bigger criminal than he really was. It was necessary for the State to show that he had been arrested fewer times than he actually testified to (R. 22). It was the defendant who introduced his prior criminal activities into the case. The difference in *Marshall* and this case is obvious. Normally inadmissible testimony was presented by the defendant as a tactic and he can't be heard to complain that outside factors caused this jury to know of his nefarious past. Defendant should not be allowed to interject the issue and then complain if the result is different than desired. He took a calculated risk and failed. The penalty for such a failure is just. To penalize the people of the State of Kansas for defendant's gamble would be unjust.

CONCLUSION

Petitioner has failed to establish a colorable question for review by this Court and it is submitted his Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT C. LONDERHOLM,
Attorney General of Kansas,
State House,
Topeka, Kansas,
KEITH SANBORN,
County Attorney of
Sedgwick County, Kansas,
Court House,
Wichita, Kansas,
Attorneys for Respondent.